IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 138 OF 1989

1. Prabhakar rajaram Utturkar;
2. Smt. Kashibai Rajaram Utturkar. ... Appellants

V/s

1. Vishnupant Rajaram Utturkar;
2. Ramrao Dattajirao Gaikwad. ... Respondents

Mr. A.V. Bandiwadekar for the appellants.

Mr. M.R. Katikar for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 13TH DEC., 2004.

P.C.:

1. This is an appeal preferred by the aggrieved defendants against the judgment and order of the lower appellate Court of the Addl. District Judge, Kolhapur dated 20.4.1988 dismissing the appeal and confirming the order of the Joint Civil Judge, Jr.Divn., Kolhapur, decreeing the suit of the plaintiff for partition and separate possession of the suit property.

2. I have heard the learned counsel for both parties. Perused the record and proceeding.

3. The subject matter of the suit is the land bearing Revision Survey No. 9/1, admeasuring 1800 sq.ft. with a building thereon which is situated in "E" Ward at Kolhapur. The plaintiff and defendant No.1 are true brothers. The plaintiff had brought the said suit on the allegation that the suit property was jointly acquired by himself and the defendant No.1 with the aid of their joint funds and as such, it was their joint family property. It was, however, stated that sale deeds of the suit property were got executed in the name of the defendant No.1. According to the plaintiff he had half share in the suit property. He began to reside separately from the defendant Nos.1 and 2 since 18.5.1970 as he was driven out of the house. Subsequently, he demanded the partition and separate possession of his half share in the suit property from the defendant No.1. However, the defendant No.1 refused to effect the partition and hence the suit came to be filed.

4. The appellant defendant No.1 contested the suit by his written statement contending to the effect that the property was purchased in his name benami by the devotees of Nabgadurga deity. He however denied that

the suit property was joint family property as alleged. He however admitted that himself and plaintiff were residing jointly and that there had been no partition between them. In substance, the defendant had denied the right of the plaintiff to seek partition and separate possession of his half share in the suit property.

The learned Trial Judge adjudicated the appeal and came to the conclusion that the plaintiff has proved his case and decree came to be passed in the suit.

The appeal was preferred against the judgment and order of the lower Court. The learned Addl. District Judge, Kolhapur concurred with the findings recorded by the learned Trial Judge and dismissed the appeal. Hence the present second appeal came to be filed.

5. At the time of admission, the substantial question of law raised was, whether it was an error apparent on the face of the record committed by the Courts below in throwing the burden of proving upon the defendants though legally it was for the plaintiff to prove his case of the suit property being either joint family property or being jointly purchased by him and the

defendant No.1 or his self acquired property as contended by him.

5. It was urged on behalf of the appellants that it was necessary for the plaintiffs to lead sufficient evidence to show the nucleus available to him to purchase the property alongwith the defendants. However, the evidence on record shows that the plaintiff was earning since long. Though his salary was not too attractive to save much amount, still his income could not be too meagre to save a little amount every month. In addition, he had raised loan after coming into force the Gold Control Act. The defendant No.1 was his surety for the same. From this it is established that the plaintiff had raised loan for the purpose of purchasing the property. The plaintiff has also established that he had taken advance from his employer and later on he opened the grocery shop in the area of Vikramnagar where there was no other shop. Moreover, the loan of Rs.2000/- was taken by the defendant No.1 with the consent of the plaintiff. Therefore, the learned appellate Court Judge has come to the conclusion, considering all these aspects, that the inference is necessarily to be drawn to the effect that the plaintiff must have contributed for the purchase of the suit

property .

In my view, the plaintiff's evidence as seen above is sufficient to hold that nucleus was available and this aspect must be appreciated coupled with the fact that, admittedly both the parties are brothers and were living jointly. It is also to be noted that defendant No.2 Smt. Kashibai was examined and she has admitted in her cross-examination that defendant No.1 is a owner of half share of the suit property by stating that half share is purchased by the defendant No.1. If this is the position, in my view, both the Courts below did not commit any error in law saddling the defendant No.1 with burden of establishing that it was a benami transaction and the property was purchased by him from the contribution of Navdurga deity. The evidence of the defendants was too short to establish this aspect and, therefore, I have no hesitation whatsoever to hold that both the Courts below have rightly concluded that the suit property is the joint family property in which plaintiff and defendant No.1 have 1/2 share each.

In the result, I hold that the appeal deserves to be dismissed and stands dismissed in limine with no order as to costs.

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